United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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74-2221

(41935)

To be argued by
SUSAN S. BELKIN

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P/S

United States Court of Appeals

For the Second Circuit

CHARLES DEFELICE, a minor under the age of 21 years, by his mother GERTRUDE DEFELICE, PETER A. DUNN, a minor under the age of 21 years, by his mother ELLEN DUNN, YVETTE HARRISON, a minor under the age of 21 years, by her mother, SUSIE HARRISON, GEORGE IRISH, JR., a minor under the age of 21 years by his father, GEORGE J. IRISH, VILMA MORAN, a minor under the age of 21 years, by her father, PEDRO MORAN, ALFREDO A. RAMOS, a minor under the age of 21 years, by his mother ALFRIDA RAMOS, on behalf of each and on behalf of all others similarly situated,

Plaintiffs-Appellees,

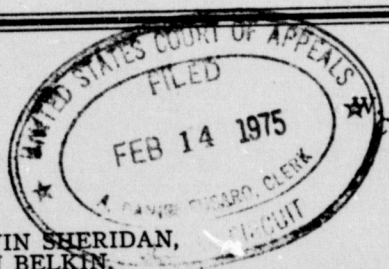
vs.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, MURRAY BERGTRAUM, President of the Board of Education of the City of New York, HARVEY B. SCRIBNER, Chancellor of the Schools of the City of New York, IRVING ANKER, Superintendent of Schools of the City of New York, JACOB ZACK, Assistant Superintendent in Charge of High Schools of the City of New York, and HILLERY C. THORNE, Director of Central Zoning of the Board of Education of the City of New York,

Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF



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The City of New York

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March 3, 1975

Clerk of the Court,
United States Court of Appeals
for the Second Circuit,
Foley Square,
New York, New York 10007

RE: Charles DeFelice et al. v. The
Board of Education, et al.

Docket No. 74-2221
Cal. No. 602

Dear Sir:

Please be informed that in the Appellants' Reply Brief in the above-mentioned case there are the following mistakes which should be corrected:

1. On page 8 line 11 reads: "While some changes were made in the eastern part of." Line 11 should read: "While some changes were made in the western part of."

2. On page 10, in the last paragraph, the 13th line from the top of the paragraph reads: "populated eastern end of the Lane zone." It should read: "populated western end of the Lane zone."

3. On page 10, in the last paragraph, the 20th line from the top of the paragraph reads: "the western border of the Lane district." It should read: "the eastern border of the Lane district."

I respectfully request that these corrections be made on the copies of the Appellants' Reply Brief filed with the United States Court of Appeals.

Thank you for your cooperation.

Very truly yours,

Susan S. Belkin

Susan S. Belkin
Appeals Division.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

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APPELLANTS' REPLY BRIEF

Introduction

Subsequent to the filing of the main brief of the defendants-appellants, this Court decided *Hart* v. *The Community School Board of Education, New York School District No. 21,* —— F. 2d —— (January 27, 1975), Slip Op. 1445. In addition, on December 6, 1974, five days prior to the filing of our main brief, the Court of Appeals for the Sixth Circuit decided *Higgins* v. *Board of Education of the City of Grand Rapids,* —— F. 2d —— (1974), Docket No. 73-2198, reported and reproduced in part, 43 U.S.L.W. 2264. Both of these decisions, which are substantially in agreement as to what constitutes constitutionally impermissible *de jure* segregation in the context of a historically unitary school system, are relevant to the instant appeal. This reply brief is submitted solely for the purpose of discussing these two decisions.*

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* Because this Court's recent *Hart* decision speaks definitively to the issue here presented, we do not specifically answer appellees' arguments or specifically discuss the cases cited by them. However, we believe the Court should note that many of the District Court decisions cited by appellees were subsequently reversed —although appellees do not bother to note this—and other of their cases involved historically dual school systems.

ARGUMENT

Under the most recent judicial pronouncements concerning what constitutes *de jure* segregation, including this Court's recent *Hart* decision, there has been no showing that Franklin K. Lane High School was unconstitutionally segregated.

(1)

In *Hart*, the United States District Court for the Eastern District of New York (WEINSTEIN, J.), had found Mark Twain Junior High School in Brooklyn to be unconstitutionally segregated by race as a result of actions by the Community School Board. The District Court ordered that the school become a model school under a magnet school plan, pursuant to a gradual transformation, and that if the plan failed, busing of children to Mark Twain would become effective. Judge Weinstein also "mooted" claims by the school board against federal, state and city authorities charging them with having caused racial school segregation at Mark Twain because of their housing policies. The Community School Board No. 21 appealed from the determination of the District Court that the segregated nature of Mark Twain was the result of *de jure*, as distinguished from *de facto*, segregation. (The plaintiffs and the Community School Board No. 21 also appealed from other parts of the District Court judgment on grounds not here relevant.)

This Court upheld the finding of *de jure* segregation and held, further, that the magnet school plan and its timing was a constitutionally acceptable plan of desegregation. As this Court noted, the *Hart* case was the first school desegregation case in the City of New York to be decided in a federal court. Slip Op., at 1456. The opinion

acknowledged that the New York City School system is not now and has never been operated as a dual school system. *Id.* at 1457.

In *Hart* the Court discussed the proper standard to be applied in a desegregation case in determining whether unconstitutional segregation exists. Citing *Swann* v. *Charlotte Mecklenburg Board of Education,* 402 U.S. 1, 23-24 (1971), the Court stated that "mere racial imbalance resulting from population shifts would not be enough to spell segregation in the constitutional sense." *Id.* at 1460. It asserted that "mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de facto* rather than *de jure* segregation." *Id.* at 1465.

The Court stated that "in Northern cities without a statutory history of racial school segregation, there is still a valid distinction, in a constitutional sense, between *de facto* segregation, a condition created by factors apart from conscious activity of government, and *de jure* segregation, caused or maintained by state action." *Id.* at 1468. This Court's standard for determination of liability in desegregation cases was stated at page 1469 of the Slip Opinion:

> "Unless the Supreme Court speaks to the contrary, we believe that a finding of *de jure* segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation. The redeployment of feeder schools is an illustration. We do not think that the Supreme Court has said that intent may not be established by proof of the foreseeable effect on the segregation picture of willful acts."

This is, perhaps, a slightly different test than we urged as the standard in determining *de jure* segregation in our main brief (at pp. 25-26). However, as this Court stated in the *Hart* decision, the difference is largely semantic between a finding of state action or inaction and "intention to segregate" on the part of a school board and like actions, or omissions which have "the natural and foreseeable consequence of causing educational segregation." *Id.* at 1471. The design or intent prerequisite to a *de jure* finding, indicated by the cases cited in our main brief,* may be evidenced by the performance of acts, "the foreseeable consequence of which is segregation." *Id.* at 1471.

In the present case the District Court did not use this legal standard in determining that Franklin K. Lane High School was an unconstitutionally segregated school. Judge Dooling issued three different opinions in which he discussed the basis of his finding of liability. In none of these did he find that appellants had changed the zone of Franklin K. Lane High School in any manner which *increased* the ethnic imbalance in that school. Instead, Judge Dooling found liability based on the Board's adherence over a long period of time to the Lane boundaries, which he said constituted "unmistakeably advertent action" by the Board of Education (928-929).

It is clear that, mere adherence to the zoning of the Lane School district, which was never shown to have been created or maintained in order to implement school segregation does not constitute "actions taken, coupled with omissions made, by governmental authorities which have

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* *Keyes* v. *School District No.* 1, 413 U.S. 189, (1973); *Johnson* v. *San Francisco Unified School District,* 500 F. 2d 349 (9th Cir. 1974); *Soria* v. *Oxnard School District Board of Trustees,* 488 F. 2d 579 (9th Cir. 1973), *cert. den.*, 416 U.S. 951 (1974).

the natural and foreseeable consequence of *causing* educational segregation". *Hart,* Slip Op. at 1469. In *Hart,* as in the present case, the District Court found that a particular school was racially imbalanced. However, the facts pertaining to the creation and maintenance of this situation in the case of Mark Twain Junior High School differ from the present case. The salient findings of the District Court in *Hart* were summarized by this Court as follows (*Hart,* Slip Op. at 1461-1462):

> "First, Public School 212 and Public School 216 are both elementary schools with predominantly white student bodies. At one time students at both elementary schools upon graduation were sent, under school board rules and regulations, to Mark Twain.
>
> Though until September 1965 about 50% of the graduating class of P.S. 216 were fed into Mark Twain, by September, 1966, pursuant to a *change in school zoning patterns,* all began feeding into J.H.S. 228 instead. This change, of course, had the foreseeable effect of decreasing the white student enrollment at Mark Twain. (emphasis added).
>
> In September, 1966, the predominantly white student body of P.S. 212 which had been feeding into Mark Twain, were now, by a *school zoning change,* fed into a recently completed junior high school, J.H.S. 281. (emphasis added).
>
> In September, 1965, a new school, P.S. 303 was opened in District #21 as an elementary facility, comprised of kindergarten through sixth grade. Beginning in September, 1968, it was transformed into an Intermediate School, under the direction of the Central Board of the Board of Education. Kindergarten through grade 5 were discontinued in

1968 and in 1971; grades 7 and 8 were added in 1969 and 1970. Since Mark Twain is a grade 7 through grade 9 school, P.S. 303 came into direct competition with it.

In adding grades 7 and 8 to P.S. 303, the *local school board withdrew children* in the almost entirely white occupied Warbasse Houses and Luna Park Houses from Mark Twain. The adverse racial impact was called to the attention of the board by the District Superintendent, but the board preferred to rely on estimates that planned housing soon to be built would contain enough white children to redress the racial imbalance at Mark Twain —an expectation which did not come to pass. (emphasis added).

At the present time, the Judge found, only P.S. 188 and P.S. 288 feed into Mark Twain. P.S. 188 in 1973 had a non-white enrollment of 79%. P.S. 288, during the same year, had a non-white population of almost 92%. In consequence, they were feeding a largely non-white group of children into Mark Twain."

The District Court found further that the foreseeable, inevitable effect of decreasing the white student enrollment at Mark Twain caused by these changes, was enhanced by the failure of the Community board to act to remedy the situation. These subsidiary findings were summarized by this Court in the *Hart* opinion, *supra,* at 1463-1465.

In the present case, on the contrary, the District Court acknowledged that the ethnic imbalance at Franklin K. Lane High School in 1972 was purely the result of demographic changes within the Lane High School zone (75a-76a, 1024-1025). The District Court did not find that the

New York City Board of Education had originally created the Lane District as a segregated school; nor did it find that the Board in any way changed the district lines in order to create and maintain racial imbalance. As noted in our main brief (at pp. 23-24), the district lines of Lane are essentially the same as they were when Lane had an ethnic composition of over 80% "white" population. The areas composed predominantly of "white" population were never removed from the Lane District (as some similar districts were removed in the *Hart* case.) While some changes were made in the eastern part of the Lane zone, these had the effect of eliminating areas that were primarily black or Puerto Rican. Thus, if anything, the actions of the Board of Education had the "foreseeable effect" of *decreasing* the ethnic imbalance at Lane, not "causing" or "increasing" segregation.

The example used by this court in the *Hart* decision, *supra* at 1469, to illustrate "foreseeable" causation was the redeployment of feeder schools. In the present case, the finding by the District Court of an obligation on the part of the Board of Education to change the long existing Lane boundaries is incorrect, in that it uses a standard for determination of liability far broader than that envisioned by this Court in *Hart, supra,* or the Supreme Court in *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973). Further, on the undisputed record evidence here, it seems clear that, under *Keyes* and *Hart,* there was no *de jure* segregation at Lane, and accordingly the complaint should have been dismissed.

(2)

As we read the Sixth Circuit's *Higgins* decision, it is to the same effect, essentially, as this Court's *Hart* decision on the issue of what sort of showing of "intent"

must be made to establish a case of *de jure* segregation. In that case the plaintiffs alleged, among other things, that the "Grand Rapids Board throughout the years in question, confined black students to largely black schools, through the use, in the first instance, of a neighborhood school system in the elementary grades, through failure to avail themselves of the opportunities to increase racial balance by changing boundary lines to favor that balance, by building and constructing schools or adding onto existing schools in such a way as to confine or lock in black students." *Higgins,* Slip Op. at 7. The District Court had concluded that the racial imbalance existing in a portion of the city's schools was the direct result of residential segregation, which in turn had resulted from "factors other than any policies or practices of the Grand Rapids Board of Education or other defendants in this lawsuit." Slip Op. at 2.

The Sixth Circuit affirmed the findings of the District Court, stating that segregation in the Grand Rapids schools was the result of housing patterns, *i.e., de facto* segregation. The Court rejected the plaintiffs' arguments that the school board had sufficient knowledge and forewarning that continued operation of a neighborhood school system would result in imbalanced schools and that this alone was enough to place on them the affirmative duty to take action to eliminate such imbalance.

The Court held that the City of Grand Rapids could not be found to be operating a dual system, based on its failure to anticipate accurately the full effect of their racially neutral retention of a neighborhood school system, absent a finding of segregative intent. *Id.* at 19. The standard enunciated by the Court, was the *Keyes* standard, requiring a showing of "intentional state action" in order to find *de jure* segregation. However, the

standard as actually applied would appear to be similar to the "foreseeable effect" test used in *Hart*.

It is significant that the Sixth Circuit found that failure to change long existing school district zoning in the light of a gradual shift in the racial composition of housing patterns did not constitute *de jure* segregation. In the present case, Judge Dooling found that the Board of Education had an affirmative duty to change the zoning for Lane High School even though the evolution of racial imbalance in the Lane District was similar to the situation in the *Higgins* case. We believe that the Board of Education did not have a duty to change the long existing boundary lines of the Lane High School district. The Board did eliminate parts of the primarily minority populated eastern end of the Lane zone. In addition, the Board developed an "open admissions" program which allowed some minority children in the Lane zone to attend predominately "white" high schools in other areas of the city. These actions had the effect of *reducing* the minority population of Lane. They did not create a further duty to change other parts of the Lane zone including the western border of the Lane district. The racial imbalance present in Lane High School, then, cannot be shown to have been created or perpetuated by state action. At most, this racial imbalance constitutes *de facto* segregation.

CONCLUSION

The order of the District Court should be reversed and the complaint ordered dismissed, with costs.

February 11, 1975.

Respectfully submitted,

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L. Kevin Sheridan,
Susan S. Belkin,
Doron Gopstein,
Of Counsel.

De Jelia

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPER

State of New York, County of New York, ss.:

Chester Mite

being duly sworn, says, that on the 14 day of Febru

at No. 1 Rockefeller Plaza in the Borough of Man in The City of New

of the annexed Appellant Reply Brief upon Marlene

the attorney for the Plaintiff-Appellee in the within

three copies of the same to a person in charge of said attorney's office during the absence of s

leaving the same with him.

Sworn to before me, this 14
day of February 19 75

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5572655 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

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